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NTSB Order No. EA-3683

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 21st day of September, 1992

THOMAS C. RICHARDS,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-10389
v.)	
)	
DENNIS IRWIN ANGELL,)	
)	
Respondent.)	
)	

OPINION AND ORDER

The respondent has appealed from the oral initial decision of Administrative Law Judge William A. Pope, II, rendered in this proceeding on January 4, 1990, at the conclusion of an evidentiary hearing.¹ By that decision the law judge affirmed in part an order of the Administrator revoking respondent's commercial pilot certificate on allegations that he operated an

¹An excerpt from the hearing transcript containing the initial decision is attached.

aircraft while under the influence of alcohol, in violation of sections 91.9 and 91.11(a)(1), (a)(2), and (a)(4)² of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91.³

The only issue before the Board in this appeal⁴ is whether the Administrator sustained his burden of proving that respondent, who was admittedly intoxicated⁵ and who was admittedly on the aircraft, a two-seater Piper Super Cub, operated its controls during the flight in question. Respondent contends that the other person on board, who is also a pilot, was the only person who manipulated the controls. Moreover, he

²As amended at the hearing.

³FAR §§ 91.9 and 91.11(a)(1), (a)(2), and (a)(4) provided at the time of the incident as follows:

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.11 Alcohol or drugs.

(a) No person may act or attempt to act as a crewmember of a civil aircraft-

(1) Within 8 hours after the consumption of any alcoholic beverage;

(2) While under the influence of alcohol....

(4) While having .04 percent by weight or more alcohol in the blood."

⁴The Administrator alleged that respondent operated an aircraft at altitudes of less than 1000 feet while performing acrobatic maneuvers over residences and business areas, in violation of FAR § 91.79(b). This allegation was not sustained by the law judge as a result of his ruling that the Administrator had not proved respondent was the pilot during the entire operation of the aircraft, infra.

⁵Respondent does not dispute that his blood alcohol content registered .165%/.164%.

argues that it was not his burden to refute the allegation that he piloted the aircraft, but the Administrator's burden to establish the identity of the operating pilot. We do not disagree with this contention, nor do we disagree that the evidence that respondent was the sole operator of the aircraft is lacking. Nonetheless, we find that the Administrator did produce sufficient evidence to satisfy his burden of proving that respondent was the pilot during at least the landing phase of the operation.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's revocation order. For the reasons that follow, we will deny respondent's appeal and affirm the initial decision.

The record before the Board establishes that on the evening in question, respondent was drinking alcohol with a man and a woman at a bar across the street from North Perry Airport. All three individuals were pilots for Aerial Sign, which is based at North Perry Airport. According to the woman, the two men decided that they would go flying. They left the bar and went to the airport, where they attempted to start a few of the planes. She observed them in an aircraft as it lifted off.

A police officer for the City of Miramar observed the aircraft flying in the dark, without lights, and making erratic engine noises. He then observed the aircraft doing loop and turn

maneuvers and flying low over residential areas. Several other local police officers also observed the aircraft, and an aerial unit was asked to respond to the situation. A Dade County sheriff's helicopter was forced to take evasive action when he believed the aircraft was intentionally heading towards him. A Broward County helicopter pilot then relayed over the radio that the aircraft appeared to be on approach to land at North Perry Airport. All of the local authorities converged on the airport.

The Administrator produced several police officers who testified regarding their observations at the airport. Respondent was seen getting out of the front seat of the aircraft, unassisted. He was placed by a police officer in a prone position on the ground and handcuffed. Only then was it noticed by the arresting officer that someone else was in the aircraft, because that person was slumped backwards in the rear seat. The individual had to be physically removed from the aircraft. He was unable to stand up due to his advanced stage of intoxication. According to another police officer, he passed out after he was placed on the ground. No one asked respondent if he was the pilot of the aircraft.⁶ Everyone apparently assumed that he was, since the other occupant did not even know where he was, and because he did not appear to be in control of his faculties.⁷

⁶When this particular aircraft is flown with two persons on board, the pilot in command is usually in the back; when it is flown alone, the pilot usually sits in the front.

⁷According to one police officer who is also a private pilot, based on his observations at the airport, there is "no way" the person in the rear could have operated the aircraft.

The other occupant was neither interrogated nor arrested.

Respondent denies that he operated the aircraft. He claims that the other occupant was a much more experienced pilot than he was and in fact, respondent insists, he does not even know how to perform acrobatic maneuvers. Thus, respondent argues, the order against him should not be affirmed because it is just as likely that the other pilot was responsible for the entire reckless operation. While we agree with respondent that the Administrator's order cannot be sustained based solely on the assumptions of the police officers that respondent was the operator of the aircraft, we are nonetheless persuaded that there is sufficient evidence to support the law judge's conclusion that respondent did at least at some point manipulate the controls of the aircraft, and therefore, acted as a crewmember within the meaning of section 91.11.

The arresting officer testified that when he arrived at the airport, he ran after the aircraft and tried to stop it as it was taxiing on the runway. He saw only one person, later identified as respondent, seated in the front of the aircraft. When the aircraft stopped, he saw that person's hand make a motion, and, simultaneously, he noted that the aircraft engine shut off.

Although the aircraft may be operated from either seat, a pilot seated in the rear would have to lean forward to reach the mixture control, throttle, ignition switches, and trim control,

(..continued)
(TR-198).

all of which are located in the front of the aircraft. There was also testimony that there are no brakes in the rear of the aircraft; in order to stop the aircraft while seated in the rear, a pilot would have to close the throttle, which again, is located in the front of the aircraft.

The Administrator also produced a letter written by respondent to his former employer, the owner of the aircraft. Respondent apologizes for the incident in this letter, expressing his remorse for having "gotten drunk" and "doing a stupid thing," although he does not directly admit that it was he who was operating the aircraft. Finally, the woman pilot who was with respondent that evening reluctantly testified that subsequent to his arrest, respondent admitted to her that he was flying the aircraft during the incident in question.⁸

The law judge concluded that the flight was a "joint venture" by respondent and the other pilot. He specifically rejected respondent's denial that he operated the controls of the aircraft at any time as not being credible, noting that both his admission to the woman pilot and his letter to the owner of the

⁸Respondent petitions in a separate pleading for a rehearing based on what he claims is "new matter." He offers documents which clearly were available to him at the time of the hearing and which he claims establishes this witness' bias against him, asserting she is his "jilted lover." The Board's Rules of Practice, 49 C.F.R. § 821.50, provides for petitions for rehearing after Board decisions on the appeal of the initial decision are served. Moreover, such petitions must explain why the new matter could not have been discovered by the exercise of due diligence prior to the date of the hearing. Respondent's petition fails to provide the requisite explanation and it is premature. Accordingly, the petition is denied.

aircraft indicate otherwise. He found significant the testimony of the police officer that the front seat pilot's hand moved at about the same time as the engine stopped, indicating that that person, i.e., respondent, was then in control of the aircraft. Since there was no reliable evidence that respondent was the only pilot operating the aircraft that evening, he concluded that the Administrator failed to establish that it was respondent who performed acrobatic maneuvers or operated the aircraft at low altitudes, as alleged in the order.⁹

We find no error in the law judge's assessment of the evidence. To the contrary, respondent's claim that he never touched the controls is, in our view, incredible in light of the several police officers' testimony that they found the other pilot slumped in the rear seat, unable to get out of the aircraft or even stand up on his own. This testimony persuades us that the respondent, not the other pilot, must have been manipulating the controls, which were in the front of the aircraft, at the time of landing.

Finally, we reject respondent's contention that only the pilot in command of an aircraft may be held responsible for a violation of section 91.11, for nothing in the wording of the regulation so limits its applicability. We have no difficulty concluding, moreover, that the public interest in air safety requires the revocation of any airman certificate whose holder acts as a crewmember of an aircraft while under the influence of

⁹The Administrator has not appealed this finding.

alcohol.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's revocation order, as modified by the law judge, and the initial decision and order are affirmed; and
3. The revocation of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.¹⁰

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹⁰For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).